

the Commission adopted in the pricing flexibility context, the criteria for meeting that threshold are considerably more stringent. Whereas the pricing flexibility test required an ILEC merely to demonstrate the existence of fiber within a wire center, in MSAs where these criteria are satisfied, competing carriers are serving end-user customers either over their own or other alternative fiber that extends to customer premises, or by using ILEC special access.⁹¹ This approach also is consistent with a lawful impairment analysis, where the relevant inquiry is not only whether competing carriers have already deployed facilities, but also whether they could obtain access to alternative facilities including special access. The fact that competing carriers are serving end-user customers in a majority of the wire centers in an MSA is strong evidence they could do so in other wire centers within that MSA as well, either through their own or other alternative facilities or by obtaining special access.

III. MASS-MARKET UNES

Technological and market developments since the *Triennial Review* proceeding conclusively show that competitors are not impaired without access to unbundled mass-market switching or the UNE platform (“UNE-P”). Since that time, there has been widespread deployment of competing voice telephone services by cable companies and VoIP providers, as well as increasing competition from wireless and other intermodal providers. Pursuant to *USTA II*, the Commission is required to consider these intermodal alternatives in asking whether “competition is possible” in the absence of UNES. In the wake of these developments — which

⁹¹ For this reason, the Commission should not adopt a higher threshold for eliminating unbundling of high-capacity loops than for eliminating unbundling of transport. The Commission took such an approach in the pricing flexibility context because the test it used for determining the presence of competitive alternatives (fiber-based collocation) did not necessarily provide direct evidence that competing carriers had connections to end-user premises. Here, by contrast, the Commission could require proof that CLECs either have lit buildings or are using special access to connect to end-user customers.

REDACTED – FOR PUBLIC INSPECTION

Chairman Powell has described as “the most significant paradigm shift in the entire history of modern communications”⁹² — the Commission can no longer continue to answer this question in the negative. Facilities-based competition for mass-market customers is not merely possible; it is actually occurring in markets throughout the country.

The fact that this competition is coming principally from intermodal sources is to be both expected and encouraged in a capital-intensive industry like telecommunications that is subject to unusually rapid technological innovation. *See Kahn/Tardiff Decl.* ¶ 7. In the transportation industry, for example, trucks, barges, and planes emerged to compete with railroads, enabling companies relying on these new technologies, such as Federal Express and United Parcel Service, to compete with incumbents like the U.S. Postal Service. *See id.* ¶ 9. Similarly, cable, VoIP, and wireless are now competing with the wireline telephone companies that were the mainstay of the industry in the past century. These intermodal forms of competition offer consumers much greater benefits than forms of competition that merely duplicate the incumbent’s offerings. *See id.* ¶ 8. Using the transportation analogy again, consumers benefit more from a choice between trucks, planes, and railroads, all of which are capable of shipping goods, albeit at different speeds and costs, than from a “choice” between a railroad and a company that pays a discount to use that same railroad’s network and sells the same shipping service under a different brand name. Likewise, cable, VoIP, and wireless now offer services that compete with traditional service by offering customers different packages of price, quality, and functionality than ILECs, and which provide more meaningful competition as a result. *See id.*

⁹² Remarks of FCC Chairman Michael K. Powell at the National Emergency Numbering Association, Washington, D.C. (Feb. 23, 2004).

Nearly 90 percent of U.S. homes now have access to cable modem service and, therefore, access to competitively supplied VoIP services, whether provided by their cable operator, by national providers such as Vonage, by major long-distance carriers such as AT&T, or by others. Wireless carriers also have continued to make substantial gains at the expense of mass-market wireline service — with nearly 20 million new wireless lines and more than double the percentage of users giving up their landline phones since the time of the *Triennial Review* proceeding. Meanwhile, the number of wireline lines has declined, and an even greater percentage of wireline voice traffic has been displaced by data and wireless networks.

Market experience shows that where these intermodal alternatives exist, they are providing significant competition for mass-market voice services. In markets throughout the country, intermodal competitors such as cable companies, VoIP providers, and wireless companies are offering local voice services that are comparable in price, quality, and functionality to conventional circuit-switched service from the ILEC. These intermodal alternatives therefore ensure that there will continue to be vibrant competition for mass-market customers regardless of whether competing carriers have access to unbundling switching and the UNE-P. Indeed, although competing carriers have significantly curtailed their purchases of UNE-P lines, Verizon has continued to lose retail residential lines at roughly the same rate as before this trend began, and this is due primarily to competition from cable, VoIP, and wireless. Wall Street analysts have reached the same conclusion, and are unanimous in the view that these trends will accelerate in the future.

Given these developments, the debate over the hot-cut process is now academic. As an initial matter, the D.C. Circuit's decision in *USTA II* precludes the Commission from basing a nationwide impairment determination solely on perceived problems with the hot-cut process. In

REDACTED – FOR PUBLIC INSPECTION

addition, competing carriers have already announced that they no longer wish to migrate UNE-P lines to their own circuit switches, and instead plan to compete for mass-market customers using new modes of entry such as VoIP. Therefore, it is unlikely that Verizon will see an increase in the demand for hot cuts. In any event, in the wake of the *Triennial Review Order*, Verizon has developed a new batch hot-cut process that has been approved by the New York PSC — one of the most stringent regulatory commissions in the country and a pioneer in developing hot-cut procedures — which found that Verizon will be able to handle anticipated hot-cut volumes, even assuming they grow to substantially above current levels.

A. Legal Considerations Regarding the Impairment Analysis for Mass-Market UNEs

In the *Triennial Review Order*, the Commission predicated its provisional nationwide impairment finding for mass-market switching on the “combined effect of all aspects of the hot cut process on competitors’ ability to serve mass market voice customers.” *Triennial Review Order* ¶ 473. The Commission next established “triggers” for determining that competitors are not impaired without UNE access to circuit switching to serve mass-market customers in a given market, based on the existence of multiple providers in that market, and delegated to the states the responsibility to define the relevant markets and to determine where the triggers are met. *See, e.g., id.* ¶¶ 498-505. Recognizing that there are other instances where, even though the triggers are not satisfied, competition is possible (and therefore there is no impairment), the Commission also delegated to states the task of determining where this is the case. *See, e.g., id.* ¶¶ 506-520. In contrast, the Commission concluded that there is no impairment (and therefore imposed no unbundling obligations) with respect to circuit switching to serve enterprise

REDACTED – FOR PUBLIC INSPECTION

customers, packet switching, and the packet switching capabilities of hybrid loops. *See, e.g., id.* ¶¶ 451-458, 537-541.

In its directions to the state commissions, and in its own analysis of mass-market switching, however, the Commission discounted the significance of competition from intermodal competitors such as cable companies and wireless providers. The Commission stressed that these intermodal alternatives are not subject to unbundling, and their facilities are thus “not generally available to new competitors.” *Id.* ¶ 443; *see id.* ¶ 446. The Commission also asserted that, at the time of the *Triennial Review Order*, it was “difficult to predict at what point cable telephony will be deployed on a more widespread basis” and that it lacked evidence showing that wireless “act[ed] broadly as an intermodal replacement for traditional wireline circuit switches.” *Id.* ¶¶ 444-445. And the Commission instructed the states, in determining whether CLECs can reasonably enter a market using their own switches, to consider “any factor that limits or lowers the potential revenues,” *id.* ¶ 484 n.1497, including low basic-service rates, *see id.* ¶ 518.

In *USTA II*, the D.C. Circuit vacated the Commission’s nationwide finding of impairment, specifically noting that the record evidence compiled in the *Triennial Review* proceeding “indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling” of “mass market switching.” 359 F.3d at 587. And the court noted that the Commission itself had concluded at various points in the *Triennial Review Order* that “a national finding” of impairment for mass-market switching “would be inconsistent with *USTA I*.” *Id.* at 569. Because, as the D.C. Circuit confirmed, the impairment inquiry turns on whether competition is possible — not on whether an actual competitor, let alone multiple competitors or multiple wholesalers, are providing service with their own switches in a given market — the

REDACTED – FOR PUBLIC INSPECTION

existence of actual competition in numerous markets demonstrated that competition is possible without UNEs in those markets and in all similarly situated markets.

The D.C. Circuit also rejected the Commission's conclusion that issues related to "hot cuts" provided a lawful predicate for the Commission's impairment finding. The court expressed "doubt that the record supports a national impairment finding for mass market switches," given the Commission's approval of incumbent hot-cut processes in every § 271 proceeding. *Id.* at 569-70. And the court faulted the Commission for requiring unbundling when "a narrower alternative" could address any concerns with "fewer disadvantages." *Id.* at 571.

The D.C. Circuit expressly "reaffirm[ed] *USTA I*'s holding that the Commission cannot ignore intermodal alternatives," though it found that it "need not decide" whether the Commission had assigned appropriate weight to such alternatives, given the court's vacatur of the mass-market switching rule on multiple other grounds. *Id.* at 572-73. And the court again rejected the Commission's inclusion of low retail rates as part of its impairment analysis, finding that the Commission had made "no attempt to connect" low retail rates "with any . . . purposes of the Act (other than, implicitly, the purpose of generating 'competition,' no matter how synthetic)." *Id.* at 573.

B. Competition in the Provision of Mass-Market Voice Service

As demonstrated below, there is now extensive facilities-based competition in the provision of voice services to mass-market customers. This is true both on a nationwide basis, and in the specific areas served by Verizon.

REDACTED – FOR PUBLIC INSPECTION

1. Cable Company Deployment of Competing Voice Telephone Services Has Expanded Exponentially Since the Triennial Review Proceeding

At the time of the *Triennial Review* proceeding, cable companies already offered circuit-switched voice telephone services to approximately 10 million homes across the country. *See Triennial Review Order* ¶ 52; *2004 Fact Report* at I-2, Table 1. Since that time, the deployment of competing voice telephone services by cable companies has expanded exponentially as cable companies both increased the scope of their circuit-switched offerings and began aggressively to roll out VoIP service over their cable networks. This increased competition is evident both nationally and in Verizon's region.

a. As a general matter, cable companies have aggressively expanded the reach of their own voice telephone services across the country. Cable companies initially began providing voice telephone service through their own circuit switches and are now aggressively rolling out VoIP service to their customers. Cable companies currently offer voice telephone service to approximately 15 percent of homes nationwide using circuit switches. *See 2004 Fact Report* at II-38 to II-39. Cable companies also now offer voice telephone service to millions of additional homes using VoIP, and have announced plans to offer VoIP to approximately 24 million homes by the end of 2004 and they plan to make it available to more than 40 million by the end of 2005 and more than 90 million by the end of 2006. *See id.* at I-5. Within two years, it is estimated that more than 80 percent of total U.S. households will have access to voice telephone service provided by their cable operator. *See id.* at II-7.

b. Cable companies have been particularly aggressive in competing for mass-market voice services in the areas where Verizon provides local telephone services as the incumbent. Cable companies already offer voice telephone service in markets containing more than 18

REDACTED – FOR PUBLIC INSPECTION

million homes in Verizon's service territory, either circuit-switched or VoIP, and have announced that they will offer service on a much wider basis by the end of this year. *See* Declaration of Michael K. Hassett and Vincent J. Woodbury ¶¶ 6, 18 ("Hassett/Woodbury Decl.") (Attachment I). Each of the major cable companies has major concentrations of customers in Verizon's service areas, and either already is offering or is in the process of rolling out voice telephone service to large numbers of customers. *See id.* ¶ 18 & Exh. 1.

Cablevision was the first cable operator to offer VoIP service throughout its service area. It now offers VoIP to the four million homes it passes in the New York metropolitan area and New Jersey and is adding an average of more than 3,400 VoIP subscribers per week (or more than 13,000 per month). *See id.* ¶ 19; *2004 Fact Report* at II-7 to II-8. Cablevision offers unlimited local and long-distance telephone service for \$34.95. *See* Hassett/Woodbury Decl. ¶ 20. It also recently rolled out a new bundled offering that includes unlimited local and long-distance telephone calls plus digital cable and high speed Internet access for \$89.85, about the same amount many of its customers already pay just for digital cable and high-speed Internet access. *See id.* Customers "are essentially receiving their voice service for free," according to Cablevision. *Id.*

Time Warner now offers VoIP service in 30 of its 31 markets and is "[o]n track to be fully launched in all" of its markets — which pass a total of 19 million homes — "by year-end 2004." *See id.* ¶ 21. Time Warner's systems pass approximately 8 million homes in Verizon's local service areas. *See id.* ¶ 21. In the first Verizon market in which Time Warner began providing VoIP service (Portland, Maine), it reports that 40 percent of its cable modem subscribers (and 14 percent of all homes passed for its cable voice) have already subscribed to Time Warner's VoIP service. *See 2004 Fact Report* at II-8. As of mid-August 2004, Time

REDACTED – FOR PUBLIC INSPECTION

Warner was signing up 1,200 customers a day (or some 36,000 customers per month) for VoIP service in its various markets. *See* Hassett/Woodbury Decl. ¶ 21 Time Warner has introduced a package of unlimited local and long-distance telephone service for \$39.95, when purchased with other services. *See id.*, Exh. 2. It also has entered into deals with the major long-distance carriers that will assist Time Warner with terminating IP voice traffic on the public switched network, delivering E911 service, local number portability, and carrying long distance traffic. *See 2004 Fact Report* at II-23 & n.108.

Comcast offers circuit-switched voice service to approximately 9.8 million homes nationally and plans to spend roughly \$750 million in capital expenditures to make VoIP available to half of the 40 million homes it passes by the end of 2004, and to 95 percent of those homes by the end of 2005. *See* Hassett/Woodbury Decl. ¶ 22; *2004 Fact Report* at II-7; M. Kupinski, *et al.*, A.G. Edwards, *Comcast Corporation: Equity Research Recent Development Report* at 2 (Aug. 11, 2004). Comcast is already offering circuit-switched voice telephone services to approximately six million homes in Verizon's local service areas — throughout eastern Massachusetts and in Pittsburgh, Richmond, Alexandria, Portland, Chicago, Dallas, Seattle, Los Angeles and Orange County. *See* Hassett/Woodbury Decl. ¶ 23. Comcast offers local and long-distance telephone service for \$49.99 or less. *See id.* If Comcast's rollout of VoIP service in Verizon's service area reflects the national average, Comcast also will be ready to offer VoIP to 8 million homes in Verizon's service areas by the end of 2004 and to more than 15 million homes by 2006. *See id.* ¶ 24.

Cox already offers circuit-switched voice service to more than half of the 10 million homes it passes nationally and is now moving to roll out VoIP services in additional markets. *See id.* ¶ 25; *2004 Fact Report* at II-7. In Verizon's service areas, Cox already offers circuit-

REDACTED – FOR PUBLIC INSPECTION

switched voice service to approximately 1.7 million homes, including the entire state of Rhode Island and in its service areas in the Tidewater region of Virginia and Orange County, California, and Cox recently added service in Fairfax County, Virginia. *See* Hassett/Woodbury Decl. ¶ 26. It offers local and long-distance telephone service for \$49.95 or less. *See id.* Cox also offers VoIP to approximately 77,000 homes in Roanoke, Virginia, and has plans to offer VoIP in up to four additional markets this year. *See id.* ¶¶ 25-26; *2004 Fact Report* at II-7.

In Verizon's service areas, Charter has announced that it plans to offer VoIP this year in Massachusetts, where it passes 284,000 homes. *See* Hassett/Woodbury Decl. ¶ 27. Starpower/RCN offers circuit-switched voice telephone service in its service areas in New York City, eastern Massachusetts, and in the metropolitan Washington, D.C. area. *See id.* ¶ 28. RCN offers its Megaphone service with unlimited local and long-distance service for \$60.00 or less. *See id.*

c. Cable companies are aggressively targeting all segments of the mass market with their voice offerings, including small business customers as well as the residential customers that cable companies have traditionally served. According to their own websites, cable companies appear to be offering service to business customers in at least 90 MSAs, which includes symmetrical services that are tailored to the needs of these customers. *See 2004 Fact Report* at III-36 & A-5, Table 3. For example, "[Cablevision] Lightpath has become the preferred provider of voice, data, and Internet services for more than 4,000 businesses throughout Long Island, Westchester County, New York City, Connecticut, and New Jersey." Hassett/Woodbury Decl. ¶ 29. Cox Business Services provides data, voice, and transport services to more than 100,000 business customers and more than 320,000 businesses lie within 100 feet of Cox's network, providing Cox a "significant opportunity." *Id.* ¶ 30. Time Warner "views the SMB market as a

REDACTED – FOR PUBLIC INSPECTION

high-growth opportunity” and has “an infrastructure there that is just ripe for commercial services. . . . We pass 1.2 million businesses” *Id.*; *2004 FactReport* at III-38, Table 19. Charter states that it has “over 600,000 small- and medium-sized businesses located within reach of our networks.” Hassett/Woodbury Decl. ¶ 31; *2004 Fact Report* at III-38, Table 19. RCN has “signed several agreements to expand its business” to provide “voice, video, data, business cable, Internet access, transport,” to “customers including universities, hospitals, and the financial and legal industries.” Hassett/Woodbury Decl. ¶ 31.

2. *VoIP Is Now Widely Available to Any Customer That Has Access to Cable Modem or Other Broadband Services*

Regardless of whether the cable companies themselves offer voice telephone service in a particular area, any customer who has access to cable modem or other broadband services also has access to VoIP from multiple providers.

a. VoIP is either already available from or is now being deployed by a wide range of companies, including major long-distance companies, such as AT&T, other national VoIP providers, such as Vonage, and numerous other national or regional providers. *See 2004 Fact Report* at II-5 to II-12 & Table 2; Hassett/Woodbury Decl. ¶¶ 33-35, 40-45.

AT&T already is offering VoIP to consumers in at least “121 major markets,” covering 62 percent of U.S. households. *See Hassett/Woodbury Decl. ¶ 33; 2004 Fact Report* at II-10. AT&T projects that it will have at least one million mass market customers by 2005. *See id.* Sprint has partnered with several cable companies (Time Warner, Charter, Mediacom) to provide telephony infrastructure to enable these cable companies quickly to deploy VoIP services with “ILEC . . . quality.” *See Hassett/Woodbury Decl. ¶ 34; A. Breznick, Cable Datacom News, Three More MSOs Tap Sprint for Quick VoIP Rollouts* (Oct. 1, 2004), available at

REDACTED – FOR PUBLIC INSPECTION

<http://www.cabledatcomnews.com/oct04/oct04-2.html>. Level 3 launched a wholesale service that provides carriers with all the building blocks needed to provide residential VoIP service. *See Hassett/Woodbury Decl.* ¶ 35; *2004 Fact Report* at II-10. This service is currently available in 50 U.S. markets, and will reach over 300 markets by the end of this year. *See id.* Net2Phone, Skype, and 8x8 have signed agreements to use the Level 3 network, as has at least one cable operator. *See Hassett/Woodbury Decl.* ¶ 35; *2004 Fact Report* at II-10.

b. Cable modem service and other broadband services that provide a delivery platform for VoIP are widely available both nationally and in Verizon's service areas in particular. Approximately 90 percent of all U.S. homes now have access to broadband service from a provider *other than* the incumbent local telephone company, principally cable modem service. *See 2004 Fact Report* at II-2. In Verizon's 50 largest MSAs in terms of the number of local access lines that Verizon provides as an incumbent, cable modem service is available to roughly 92 percent of the population throughout these MSAs. *See Hassett/Woodbury Decl.* ¶ 37 & Exh. 3. Verizon identified the cable systems offering cable modem service from Warren Communications' *Cable Factbook* and publicly available information and then mapped the areas served by those systems within each MSA. These are the Maps labeled "B" in Attachment O to these comments.

Approximately 15 percent of all U.S. homes already subscribe to cable modem service, up from 8 percent at the time of the *Triennial Review* proceeding. *See 2004 Fact Report* at I-2, Table 1. That number is expected to rise to more than 20 percent within the next two years. *See id.* at I-12, Table 9. In the states where Verizon provides local telephone service as an incumbent, there already were more than 11 million cable modem subscribers by the end of 2003 — a 46 percent increase from the previous year alone. *See Hassett/Woodbury Decl.* ¶ 39.

REDACTED – FOR PUBLIC INSPECTION

c. VoIP is not only available from numerous providers, but it competes directly with traditional telephone service and reflects the future of voice telephone service. For each of Verizon's top-50 MSAs, Verizon has prepared charts that compare the prices and features of the voice telephone service offerings of several leading competitors, including VoIP offerings. These charts, which are based on information obtained from websites, tariffs and other publicly available sources, are found in Exhibit 2 to the Hassett/Woodbury Declaration. The service packages listed on the charts are those most prominently featured in advertising materials, and include prices for packages that are comparable between service providers. These charts show that VoIP offerings are very competitive in terms of the services and features included. Indeed, VoIP service is typically priced 30-40 percent or more below comparable circuit-switched offerings. *See Hassett/Woodbury Decl. ¶ 42; 2004 Fact Report at II-17, Table 4 & App. B.*

In New York, for example, AT&T offers VoIP service for \$29.99 per month, compared to \$54.95 per month for its comparable UNE-P-based offering, and also offers significant promotional discounts to new VoIP subscribers. *See Hassett/Woodbury Decl. ¶ 42; 2004 Fact Report at B-1.* Time Warner offers a bundled package of local and long-distance service for \$39.95. *Hassett/Woodbury Decl. ¶ 43; 2004 Fact Report at B-1.* Cablevision offers a similar package for \$34.95. *See Hassett/Woodbury Decl. ¶ 44; 2004 Fact Report at II-17, Table 4 & B-1.* Cablevision also recently introduced a bundled package of local and long distance, high-speed Internet access, and digital cable for \$89.85 — about the same price it previously charged for high speed Internet access and digital cable alone. *See Hassett/Woodbury Decl. ¶ 44.* The result, according to Cablevision, is that customers “are essentially receiving their voice service for free.” *Id. ¶ 20.* Vonage offers an unlimited local and long-distance package for only \$24.99 per

REDACTED – FOR PUBLIC INSPECTION

month, having recently cut its prices by \$5 per month in response to AT&T's \$5 price decrease. *Id.* ¶¶ 42, 45. And Lingo, BroadVoice, and Packet8 offer similar packages for \$19.95. *Id.* ¶ 45.

Even for customers who have not yet subscribed to broadband service, the combination of cable modem service and VoIP is competitive with what customers pay for a narrowband bundle of local, long distance and dial-up Internet access. *See 2004 Fact Report* at II-19 & Table 5. A cable modem broadband connection equipped with VoIP service typically now sells for between \$77 and \$87 per month. *See id.* This is comparable to the price for dial-up Internet access plus a bundled local and long-distance plan. *See id.* Thus, VoIP offerings are competitive for the approximately one-third of U.S. households that still use dial-up access. *See id.* at II-17 to II-18. As one independent study along these lines concluded, the average narrowband household could in fact capture a net savings of \$8 per month by subscribing to broadband and migrating to VoIP service.⁹³

Even at these low rates, VoIP providers are reporting generous profit margins.⁹⁴ Cablevision estimates that its margins are 40-45 percent, with a capital payback of 10 months. *See 2004 Fact Report* at II-16; Hassett/Woodbury Decl. ¶ 47. Vonage has reported its margins at 70 percent, headed to 80 percent. *See 2004 Fact Report* at II-16; Hassett/Woodbury Decl. ¶ 47. Wall Street analysts and other observers estimate that a cable company VoIP provider will have cash flow margins of approximately 40 percent. *See 2004 Fact Report* at II-16; Hassett/Woodbury Decl. ¶ 47.

⁹³ *Parks Associates: VoIP Key to Boosting Broadband Adoption*, Business Wire (Feb. 10, 2004), available at http://www.smarthomeforum.com/start/show_news.asp?NID=257.

⁹⁴ This reflects the fact that the incremental cost of providing voice-over broadband service to an existing broadband subscriber is quite low — no more than between \$5 and \$9 per month, according the cable companies and VoIP-based service providers who offer voice-over-broadband services to these customers. *See 2004 Fact Report* at II-14 to II-15.

VoIP has rapidly gained acceptance as a replacement for traditional local telephone service. For example, 86 percent of Time Warner's VoIP customers keep their old phone number, as do 50 percent of Vonage customers. *See 2004 Fact Report* at II-25; Hassett/Woodbury Decl. ¶ 48. More generally, in a recent Gallup Poll, "[r]oughly 34% of respondents that do not have VoIP [said they] would switch from their existing landline service to VoIP for cost savings." *See 2004 Fact Report* at II-8; Hassett/Woodbury Decl. ¶ 49.

3. *Wireless Carriers and Other Intermodal Competitors Are Competing Extensively Both for Lines and for Minutes*

Wireless carriers compete with incumbent wireline carriers both for local access lines and, even more extensively, for local and long-distance calls.

a. As a general matter, wireless service competes directly with landline telephone service. Since the *Triennial Review* proceeding, the number of wireless subscribers has grown from 129 million to 161 million, and the number is continuing to grow at 20 million subscribers per year. *See 2004 Fact Report* at II-28; Hassett/Woodbury Decl. ¶ 51. By contrast, the number of wireline access lines has declined. *See 2004 Fact Report*; Hassett/Woodbury Decl. ¶ 51. An increasing share of wireless subscribers are abandoning their wireline phones. As of year-end 2004, wireless will have displaced 11 million wireline access lines, a number projected to reach 22 million by 2008. *See 2004 Fact Report* at II-29, Table 8, & II-30, Figure 4; Hassett/Woodbury Decl. ¶ 52 & Exh. 7. Since the *Triennial Review* proceeding, the percentage of wireless users that have given up wireline service has grown from 3-5 percent to 7-8 percent. *See 2004 Fact Report* at II-28 to II-29 & Table 8; Hassett/Woodbury Decl. ¶ 53 & Exh. 6. Approximately 2.7 million additional wireless subscribers are now giving up their wireline phones each year. *See 2004 Fact Report* at II-28 to II-29; Hassett/Woodbury Decl. ¶ 53. In

REDACTED – FOR PUBLIC INSPECTION

addition, at least 14 percent of U.S. consumers now use their wireless phone as their primary phone. *See 2004 Fact Report* at II-30; Hassett/Woodbury Decl. ¶ 53.

b. In addition to competing for access lines, wireless carriers are competing even more extensively to displace telephone calls (thereby displacing revenue producing minutes) that previously used the switched wireline network. This means that wireless service competes with the incumbent carrier's circuit switch even where the entire line is not displaced, and is therefore particularly relevant to the issue of whether switching must be unbundled. Wireless service packages include "long distance calling, which has directly contributed to wireline traffic substitution and historically increasing average minutes of use (MOUs) among wireless carriers." Hassett/Woodbury Decl. ¶ 55. One Wall Street analyst estimates that "approximately 23% of voice minutes in 2003 were wireless," and that for 2004 "wireless could make up approximately 29% of voice minutes in the US." *See Hassett/Woodbury Decl. ¶ 56; 2004 Fact Report* at II-30. The increase in wireless long-distance calls is even greater. Another analyst estimates that 43 percent of long-distance calls are now made on wireless phones. *See Hassett/Woodbury Decl. ¶ 57; 2004 Fact Report* at II-30. By contrast, the FCC's own data show that average residential wireline toll minutes have declined rapidly for the industry as a whole — from an average of 149 minutes per month in 1997, down to only 90 minutes per month in 2002. *See Hassett/Woodbury Decl. ¶ 58 & Exh. 9.* In total, consumers have reduced the number of long-distance minutes of use on landline phones by 40 percent over the past five years. *See id.* ¶ 58. Wireless carriers also now offer a variety of data services that compete for data traffic as well. *See 2004 Fact Report* at II-35 to II-37. According to a recent survey by J.D. Power and Associates, the number

REDACTED – FOR PUBLIC INSPECTION

of text messages received by the average wireless subscriber has increased by 44 percent in just the past year (to 13 text messages per month).⁹⁵

c. In Verizon's service areas, wireless service is widely available from multiple providers. For each of Verizon's top-50 MSAs, Verizon has identified the areas served by wireless carriers by examining wireless carriers' coverage maps listed on their websites and then mapping these areas by MSA. These are the maps labeled "C" in Attachment O to these comments. In addition, the maps labeled "A" in Attachment O depict the coverage areas of wireless carriers together with the areas served by two other forms of mass-market competition — VoIP over cable broadband and CLECs using their own switches together with unbundled analog loops. As these maps demonstrate, in these MSAs, virtually all portions of Verizon's service areas have wireless service available from several carriers, as well as other competitive alternatives in most of those same areas.

d. Wireless service is competitive with wireline service in price, quality, and functionality. For each of Verizon's top-50 MSAs, Verizon has prepared a series of charts that compare the prices and features of the voice telephone service offerings of several leading competitors, including wireless offerings. *See* Hassett/Woodbury Decl. ¶ 63 & Exh. 2. These charts show that wireless offerings are fully competitive with wireline service in respect to price. Indeed, wireless carriers were the first to offer rate packages that included local and long-distance calls, and wireline and cable companies then introduced their own bundled rate packages to respond to those wireless rate packages. One Wall Street analyst notes that

⁹⁵ J.D. Power and Associates Press Release, *J.D. Power and Associates Reports: Satisfaction with Wireless Service Providers Increases Significantly As Customers Report Higher Ratings in Call Quality and Cost-Related Attributes* (Sept. 9, 2004); *see also Ninth CMRS Report* ¶¶ 5, 222 ("the popularity of text messaging . . . increased during 2003").

REDACTED – FOR PUBLIC INSPECTION

“[w]ireless pricing dropped below wireline pricing in 2003 for the first time.” *Id.* ¶ 64. Many other analysts and the Commission have reached the same conclusion. *See 2004 Fact Report* at II-31. In its 2004 CMRS Competition Report, the Commission found that trends which include “a decrease in the number of residential access lines, a drop in long distance revenues, and a decline in payphone profits” continued, noting an analyst’s statement that “‘wireless cannibalization remains a key driver of access line erosion.’” *Ninth CMRS Report* ¶ 213 (footnotes omitted).

In addition to competitive pricing, wireless service is competitive with the quality of wireline service. Since the *Triennial Review*, carriers have invested heavily to improve the network coverage, *see 2004 Fact Report* at II-34, and today, the vast majority of wireless consumers are satisfied with the quality of service. For example, a 2003 General Accounting Office (“GAO”) survey found that 83 percent of wireless users were satisfied with the call quality of their cell phones, while only 9 percent were dissatisfied.⁹⁶ A September 2004 survey by J.D. Power and Associates found that “[o]verall satisfaction performance with wireless service providers has increased 5 percent over 2003,” and that satisfaction with call quality increased by 7 percent during that same period.⁹⁷ Analysts similarly report that “[c]ultural

⁹⁶ General Accounting Office, *FCC Should Include Call Quality in Its Annual Report on Competition in Mobile Phone Services* at 27, Report No. GAO-03-501 (Apr. 2003), available at <http://www.gao.gov/new.items/d03501.pdf>; *see* Hassett/Woodbury Decl. ¶ 67.

⁹⁷ J.D. Power and Associates Press Release, *J.D. Power and Associates Reports: Satisfaction with Wireless Service Providers Increases Significantly as Customers Report Higher Ratings in Call Quality and Cost-Related Attributes* (Sept. 9, 2004).

awareness and acceptance of wireless as an acceptable/preferred communication medium is growing.”⁹⁸

e. Other sources of intermodal competition such as e-mail and instant messaging (“IM”) also now substitute for a large amount of traffic on switched wireline networks. A large and growing portion of this traffic originates and/or terminates on competitive networks, but even when carried over the incumbents’ network, such traffic displaces significant usage-sensitive (e.g., per-minute or per-call) revenues that incumbents otherwise would earn. Customers are sending approximately 9 billion person-to-person messages per day. *See* Hassett/Woodbury Decl. ¶ 69; *2004 Fact Report* at I-6. If only 5 percent of these e-mail and instant messages substitute for a 90-second voice call, this data traffic has displaced more than 10 percent of the voice traffic that passes through the incumbents’ networks. *See* Hassett/Woodbury Decl. ¶ 69; *2004 Fact Report* at I-6.

4. Competition from Competitors with Their Own Circuit Switches

a. Competing carriers also can use their own circuit switches to provide competitive voice telephone service to the mass market without using incumbent carriers’ unbundled switching. The reality, however, is that this form of competition has been overtaken by the intermodal alternatives described above, which are more economical and also provide competing carriers more ability to differentiate their service offerings from the incumbent’s.

Thus, while CLECs had deployed approximately 1,200 circuit switches as of the time of the *Triennial Review*, they have deployed few if any new circuit switches since that time. *See* Declaration of Ronald H. Lataille ¶ 6 (Attachment J) (“Lataille Decl.”); *2004 Fact Report* at II-

⁹⁸ S. Ellison, IDC, *U.S. Wireless Displacement of Wireline Access Lines Forecast and Analysis, 2003-2007* at 4 (Aug. 2003); *see* Hassett/Woodbury Decl. ¶ 67.

37. Likewise, while the Commission's data indicate that the number of mass-market lines served by competitors with their own switches has continued to grow to some 6.2 million lines, that data show that carriers were serving approximately 3 million mass-market lines nationwide using their own circuit-switches together with unbundled loops at the time of the *Triennial Review*, and that number is essentially the same today as well. The number of mass-market lines served by cable operators using circuit switches continued to grow to 3.2 million lines during that same period (and, as explained above, cable companies are offering service to many millions more). *See 2004 Fact Report* at II-42. Competing providers that at one time claimed they wanted to migrate mass-market customers from UNE-P to their own switches, have now decided to pursue other strategies such as VoIP, and cable operators are aggressively deploying VoIP as well.

b. Verizon has nonetheless compiled data showing that competitive switches are widely deployed in Verizon's service areas and have been used extensively to serve mass-market lines. Verizon identified the DS0 loops served by competitive switches in Verizon's top-50 MSAs through its wholesale loop records. *See Lataille Decl.* ¶ 8.⁹⁹ In addition, Verizon examined residential cable companies' E911 records to identify the mass-market lines that are being served by cable companies entirely over their own facilities. Based on these two sources of data, competitors in Verizon's top-50 MSAs, are serving at least 2.2 million mass-market lines using at least 180 of their own switches. *See Lataille Decl.* ¶ 8.

For each of Verizon's top-50 MSAs, Verizon has prepared maps showing the number of competitive switches, the number of mass-market lines served by each switch, and the wire center area where those mass-market customers are located. These maps are labeled maps "D"

⁹⁹ According to the FCC, "voice-grade analog loops, DS0 loops, and loops that deploy xDSL services, are used to serve customers typically associated with the mass market." *Triennial Review Order* ¶ 197 n.624.

REDACTED – FOR PUBLIC INSPECTION

in Attachment O to these comments.¹⁰⁰ In the New York MSA, for example, competitors are serving approximately 415,000 mass-market lines using at least 28 of their own switches within the MSA. *See id.* ¶ 9, Exh. 1. In the Boston MSA, competitors are serving approximately 392,000 mass-market lines using at least 12 of their own switches within the MSA and 5 switches located outside the MSA. *See id.* And in the Buffalo MSA, competitors are serving approximately 51,000 mass-market lines using at least 4 of their own switches within the MSA. *See id.*

Verizon's data also show that competing carriers' switches are capable of serving, and are being used to serve, customers located throughout Verizon's top-50 MSAs. Indeed, CLECs already are using their own switches to serve lines in Verizon wire centers that have the vast majority of the access lines in the MSA. In the New York MSA, for example, CLECs are serving lines in Verizon's wire centers that contain 93.2 percent of all access lines in the MSA. *See id.* ¶ 11. In the Providence MSA, CLECs are serving lines in Verizon's wire centers that contain 99.7 percent of all access lines in the MSA. *See id.* And in the Virginia Beach MSA, CLECs are serving lines in Verizon's wire centers contain 88.9 percent of all access lines in the MSA. *See id.*

The evidence also demonstrates the extensive geographic reach of competitive switches. For each switch deployed by a competitor in one of Verizon's top-50 MSAs, Verizon determined the most distant mass-market lines served by that switch and used that distance as the radius for a circle drawn around each switch to show the geographic area that could be served by that switch. *See id.* ¶ 12. Verizon prepared maps for each of Verizon's top-50 MSAs showing the geographic areas that could be served by each competitive switch and color-coded those areas to show the

¹⁰⁰ Maps A show this data together with the coverage areas of wireless providers.

number of competitors that are or could reasonably serve each area in the MSA. These are the maps labeled “E” in Attachment O to these comments.¹⁰¹ For example, there are five competitive carriers that are or could reasonably serve virtually the entire Boston MSA. In addition, the average reach of the competitive switches in the Boston MSA is over 40 miles. These maps provide further evidence that competitive switches are capable of serving customers throughout Verizon’s top-50 MSAs.

5. *Mass-Market Competition Will Continue To Thrive in the Absence of UNE-Based Competition*

Market experience shows that, in markets throughout the country, intermodal competitors such as cable companies, VoIP providers, and wireless companies are offering local voice services that are comparable in price, quality, and functionality to conventional circuit-switched service from the ILEC. *See* Hassett/Woodbury Decl. ¶¶ 40-41 & Exh. 2; *2004 Fact Report* at II-17, Table 4 & App. B. These intermodal alternatives therefore ensure that there will continue to be vibrant mass-market competition regardless of whether competing carriers have access to unbundling switching and the UNE-P.

Verizon’s data show that this is exactly what has already been occurring in the market. In particular, these data show that, although competing carriers have significantly curtailed their purchases of UNE-P lines, Verizon has continued to lose retail residential lines at roughly the same rate as before this trend began, and that this is due primarily to competition from cable, VoIP, and wireless. *See* Lataille Decl. ¶ 19 & Exh. 4. During these months of declining UNE-P volumes, Verizon has nonetheless continued to experience roughly the same rate of decline in

¹⁰¹ The maps labeled “F” show, for four MSAs, instances where competitive switches are not currently being used to serve mass-market customers within Verizon’s service territory in the MSA, but are nonetheless capable of doing so given that Verizon’s service territory is within the average serving radius of these switches.

REDACTED – FOR PUBLIC INSPECTION

residential lines. *See id.* The only explanation for this trend is that intermodal competition is now replacing UNE-P as the predominant form of competition for residential mass-market customers.¹⁰²

Wall Street analysts have reached this very same conclusion. *See 2004 Fact Report* at I-4, Table 3. For example, Fulcrum explains that “[e]ven without UNE-P, we expect continued competitive line losses for [the BOCs], as wireless competition continues to proliferate with attractive offerings that provide consumers incentive to substitute wireless for wireline services. Similarly, with an announced and an effective acceleration of cable telephony, we expect line losses to continue.”¹⁰³ Analysts have also observed that since the decision of the major UNE-P carriers to abandon that mode of entry, prices have remained stable or decreased.¹⁰⁴

Even competing carriers themselves have come around to this view. AT&T, which as recently as August 2002 had argued that facilities-based competition for the mass-market was “impossible” without TELRIC-priced access to the UNE platform¹⁰⁵ — has now given up UNE-P entirely and announced that its new “consumer strategy” is to migrate everything to voice over

¹⁰² Although some Verizon residential customers are replacing their retail lines with Verizon’s DSL services, the additional DSL lines do not come close to making up for Verizon’s retail residential line losses, especially in light of the dramatic drop in the number of orders for UNE-P lines. *See Lataille Decl.* ¶ 19.

¹⁰³ G. Miller, *et al.*, Fulcrum Global Partners, *Wireline Communications: Revising BLS and SBC Estimates Due to AWE Dilution* at 2 (Mar. 10, 2004).

¹⁰⁴ *See, e.g.,* J. Breen, *et al.*, Thomas Weisel Partners, *Telecom Pricing Survey: Local Voice Stable Despite VoIP; Video and HSD Heating Up* at 1 (Sept. 15, 2004) (“Voice — Local traditional telephone service and long distance pricing have held steady since our last survey. The real competition in this area is coming from VoIP where pricing is very aggressive. . . . Wireless providers continue to lower their price per minute as this space remains highly competitive.”).

¹⁰⁵ Opposition of AT&T Corp. at 50, *Petition for Forbearance From the Current Pricing Rules for the Unbundled Network Platform*, WC Docket No. 03-157 (FCC filed Aug. 18, 2003).

REDACTED – FOR PUBLIC INSPECTION

broadband.¹⁰⁶ Z-Tel — which less than a year ago still insisted that facilities-based mass-market competition was “uneconomic, inefficient, commercially impracticable, and, in most cases, technically infeasible”¹⁰⁷ — has informed Wall Street that the company is “moving to VoIP from UNE-P.”¹⁰⁸

The fact that intermodal competition is now thriving in the absence of UNE-P also is consistent with the fact that UNE-P has, until now, impeded investment in facilities-based modes of entry. As analysts have noted, UNE-P “is negative for all companies providing local telephony or planning to enter that business, including cable companies.”¹⁰⁹ As a result, “where UNE-P is successful, cable telephony has not been.”¹¹⁰ Thus, in the wake of AT&T’s decision to

¹⁰⁶ John Polumbo, *President and CEO AT&T Consumer, AT&T Consumer Overview: Bending the Trends* at 11 (Feb. 25, 2004); Cathy Martine, SVP Internet Telephony & Consumer Product Management, AT&T, *Voice over IP* at 10 (Feb. 25, 2004).

¹⁰⁷ Plaintiff’s Original Complaint at 11, *Z-Tel v. SBC Communications Inc.*, CA No. 5:03CV229 (E.D. Tex. filed Oct. 9, 2003).

¹⁰⁸ Z-Tel Presentation for the Needham & Co. Sixth Annual Growth Conference (Jan. 2004), *available at* http://media.corporate-ir.net/media_files/NDS/ZTEL/presentations/0104.pdf.

¹⁰⁹ N. Gupta, *et al.*, Salomon Smith Barney, Investext Rpt. No. 7238096, *Cable — UNE-P Ruling Has Mixed Impact on Cable — Industry Report* at *1 (Feb. 21, 2003) (“Cox Communications, in particular, and Comcast . . . are most affected on a longer-term basis.”).

¹¹⁰ G. Miller, *et al.*, Fulcrum Global Partners LLC, *Wireline Communications: Revising BLS and SBC Estimates Due to AWE Dilution* at 2, 7 (Mar. 10, 2004) (“Eliminating UNE-P based resale all together would offer incentives to cable companies to pursue such a customer base without the fear that 50 or more local resellers, with little capital requirements, would flood the market.”); *see also* J. Bazinet, *et al.*, JP Morgan, *The Regulatory Handbook: 2003; The Implications of Pending Regulatory Changes in the Telecom, Media, and Cable Sectors* at 13 (Jan. 16, 2003) (“Investment Thesis #4 — Cable Voice Is an Attractive, But Nascent, Business. We believe the voice business could be positively affected if unbundled network element obligations are dropped. If they are, the ILECs will no longer be required to provide their voice network to new competitors entering the market. That would leave more of the market for cable companies, like Cox or Comcast. We think it’s likely that these restrictions will be lifted in the next 12-18 months, and this would be positive for cable.”); Raymond James (Feb. 2004) (“UNE-P has flourished once prices hit a certain threshold; yet we have seen little evidence of the

REDACTED – FOR PUBLIC INSPECTION

stop marketing UNE-P, Cox proclaimed that this “will be very positive for Cox” and “may actually be better news for the MSOs than the RBOCs.”¹¹¹

Moreover, the rapid growth of intermodal alternatives also shows that the real source of mass-market competition is alternative platforms that do not use and do not need unbundled loops. As Verizon explained in the *Triennial Review* proceeding, there is no basis for an impairment finding with respect to analog loops in any geographic market where both cable telephony and digital CMRS service are available. Where cable operators themselves are offering a competing voice telephone service over their own facilities, then there unquestionably is at least one direct facilities-based alternative to the ILEC. The fact that wireless is available in addition provides still further facilities-based competition, and of course neither cable nor wireless needs access to unbundled loops. As demonstrated above, since the *Triennial Review* proceeding these alternatives have become even more widely available and competitive with ILEC voice service. In addition, the advent of VoIP means that voice services can be provided over alternative broadband networks, and, as demonstrated above, nearly 90 percent of households have access to a broadband loop supplied by a company other than the ILEC. These developments clearly show that, in the D.C. Circuit’s words, “competition is possible” for mass-market voice service without access to unbundled loops, and that, at a minimum, the Commission should eliminate unbundling for these loops under the circumstances that Verizon previously identified in the *Triennial Review* proceeding.

providers’ desire to build their own facilities, as they are earning very healthy returns under the current model.”).

¹¹¹ UBS Conference Call with Cox Executives (July 26, 2004) (quoting David Pugliese, VP of Marketing, Cox).

REDACTED – FOR PUBLIC INSPECTION

C. Verizon’s Hot-Cut Processes Can Handle Any Demand for Competitors That Wish To Use Their Circuit Switches Together with Unbundled Loops

The *Triennial Review Order* found that competing carriers were impaired in the provision of mass-market switching based “solely” on the perceived lack of adequate hot-cut processes used to transfer an incumbent LEC’s narrowband loop to a CLEC’s circuit switch.¹¹² Whatever the merits of that determination, the debate over the hot-cut process is now academic.

First, the D.C. Circuit’s decision in *USTA II* precludes the Commission from basing a nationwide impairment determination solely on perceived problems with the hot-cut process. As the Court held, the Commission can no longer “support an undifferentiated nationwide impairment finding” in the provision of mass-market switching on “hot cut difficulties” or “uncertainty about whether ILECs would be able to handle the increases in hot cut demand.” *USTA II*, 359 F.3d at 570. The Commission must instead address any hot-cut concerns directly, which means taking into account all viable competitive alternatives to hot cuts, including both intermodal competitors, as well as alternatives to mandating unbundling. More fundamentally, however, the court has instructed the Commission that ordinary start-up costs — “cost disparities that are universal as between new entrants and incumbents in *any* industry” — are insufficient to establish impairment under any circumstance. *USTA I*, 290 F.3d at 427. Hot-cut costs are a customer-acquisition cost of the kind that is common across many industries. In fact, many industries experience one-time customer acquisition costs much larger than \$50 — indeed, long-distance companies frequently offer \$100 checks to woo new customers.¹¹³ When AT&T began

¹¹² See *Triennial Review Order* ¶¶ 459 n.1405, 476; *USTA II*, 359 F.3d at 569 (“the Order makes clear that the national impairment finding was based solely on hot cuts”).

¹¹³ See ILEC Reply Brief in Support of Petitions for a Writ of Mandamus, Attach. 1, *USTA v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. filed Oct. 16, 2003).

deploying its new VoIP service, for example, it attempted to attract customers by offering them \$20 off the basic rate for the first six months — a \$120 value.¹¹⁴ The existence of these universal and transient costs at the early stages of entry does not establish that over the long-term — “over the entire extent of the market,” *USTA I*, 290 F.3d at 427 — mass-market switching is not suitable for competitive supply.¹¹⁵

Second, competing carriers have already announced that they no longer wish to migrate UNE-P lines to their own circuit switches, and instead plan to compete for mass-market customers using new modes of entry such as VoIP. Thus, the demand for hot cuts will almost certainly be extremely low, and previous concerns about the ability of ILECs to handle large volumes of hot cuts are largely irrelevant. Each of the nation’s major providers of UNE-P service have already abandoned the provision of UNE-P service, the number of hot cuts that Verizon performs is declining rapidly, and carriers that previously used UNE-P have stated that they plan to use VoIP, rather than circuit switches and unbundled loops, to serve mass-market customers in the future. For example, in July, AT&T announced that it would “no longer be

¹¹⁴ See AT&T News Release, *AT&T Ushers in New Era in Communication with Launch of AT&T CallVantage Service-New Jersey* (Mar. 29, 2004).

¹¹⁵ To the extent the Commission based its impairment finding in the *Triennial Review Order* on the basis of purported difficulties relating to collocation, that finding is likewise insupportable. At the end of 1998, CLECs had obtained 4,300 collocation arrangements from the Bell companies; by year-end 2001, there were almost 25,000 such collocation arrangements in place, a more than six-fold increase. See *UNE Fact Report 2002* at I-4 & Table I-2 (Apr. 2002), attached to Comments of Verizon, CC Docket Nos. 01-338, *et al.* (FCC filed Apr. 5, 2002). At that point, CLECs were collocated in central offices that served 81 percent of all Bell company access lines, including 79 percent of all residential lines. *Id.* at II-16 & Table II-10. In addition, as with hot-cut processes, the Commission has confirmed that the Bell companies are fulfilling their obligations to provide collocation in 48 states and the District of Columbia.

REDACTED – FOR PUBLIC INSPECTION

competing for residential local” customers through UNE-P,¹¹⁶ and that instead it “will be promoting the VoIP product.”¹¹⁷ Sprint has “essentially stopped our marketing efforts around the UNE-P,”¹¹⁸ and has announced deals to assist cable operators in deploying VoIP services.¹¹⁹ Z-Tel has stated that in light of the “elimination of UNEP as a working economic business model” it has begun the “rollout of our VoIP related services,” which it claims “are off to very strong starts in Tampa and Atlanta.”¹²⁰

As the decisions of these carriers to abandon UNE-P in favor of other modes of competition demonstrate, others forms of competition are rapidly accelerating and will undoubtedly attract large numbers of mass-market customers that might otherwise have been served through UNE-based modes of entry. Moreover, as described above, cable operators and

¹¹⁶ AT&T Corp. News Release, *AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets* (July 22, 2004); see also *Q2 2004 AT&T Earnings Conference Call — Final*, FD (Fair Disclosure) Wire, Transcript 072204aj.776, at 8 (July 22, 2004) (“I didn’t want someone to come away with the idea that the interim rules, which we yet don’t have, and the permanent rules would change our view about going forward in UNEP for acquisition. That chapter is closed. . . . [W]e are not going to revisit the UNEP platform discussion again.”).

¹¹⁷ *Q2 2004 AT&T Earnings Conference Call — Final*, FD (Fair Disclosure) Wire, Transcript 072204aj.776, at 3 (July 22, 2004) (“The AT&T brand . . . continues to service well in the consumer voice space where we have now entered 100, the top 100 residential markets in the country with our AT&T Call Vantage offer and we will continue to provide VoIP users with all the advanced features and functionality that AT&T’s CallVantage has to offer.”).

¹¹⁸ *Q2 2004 Sprint Earnings Conference Call — Final*, FD (Fair Disclosure) Wire, Transcript 072104at.750, at 12 (July 21, 2004).

¹¹⁹ See Charter Press Release, *Charter Taps Three Telephony Partners; Level 3, Sprint and Accenture To Enhance, Expedite Charter Telephone* (Aug. 30, 2004), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=608177&highlight>.

¹²⁰ Z-Tel Technologies Inc. News Release, *Z-Tel Announces Second Quarter Financial Results* (Aug. 9, 2004) (quoting Z-Tel’s CEO D. Gregory Smith); Z-Tel Technologies Inc., Form 8-K at 2 (SEC filed July 27, 2004) (“Z-Tel Form 8-K”) (question-and-answer session with Z-Tel CEO D. Gregory Smith).

REDACTED – FOR PUBLIC INSPECTION

other new entrants are likewise pursuing non-UNE-based modes of entry, and will undoubtedly attract millions of customers that also might otherwise have been served through UNE-P or unbundled loops and competitive circuit switches. Taken together, the emergence of these new forms of competition means that there is likely to be little (if any) increase in demand for hot-cuts to migrate the large embedded base of UNE-P customers to UNE-L, or to serve new mass-market customers on competitors' switches.

Third, in any event, in the wake of the *Triennial Review Order*, Verizon has developed a new “batch” hot-cut process that eliminates any prior concerns about the ability of competing carriers to compete using their own circuit switches and unbundled loops. Verizon’s new batch process has been approved by the New York PSC — one of the most stringent regulatory commissions in the country and a pioneer in developing hot-cut procedures, *see, e.g., New York 271 Order* ¶ 6 — which has concluded that Verizon will be able to handle the volumes that could be anticipated in an environment in which competing carriers no longer can obtain access to unbundled mass-market switching.¹²¹ The New York PSC specifically concluded that Verizon “could scale up its hot cut activities,” even assuming that “Verizon will be required to increase its hot cut activity dramatically.” *New York Hot Cut Order* at 59, 62.

For the same reasons that the New York PSC concluded that Verizon can process whatever volume of hot cuts that may materialize in New York, Verizon will have the same ability to meet any future demand for hot cuts in all of the other states throughout its region. As an initial matter, New York is Verizon’s largest state in terms of both retail access lines and

¹²¹ See Order Setting Permanent Hot Cut Rates, *Proceeding on Motion of the Commission To Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis*, Case 02-C-1425 (N.Y. PSC Aug. 25, 2004) (“*New York Hot Cut Order*”).

REDACTED – FOR PUBLIC INSPECTION

UNE-P lines. Thus, the fact that Verizon can handle the very large volumes of hot cuts that were assumed in New York — volumes that are much larger than will ever materialize given the seismic shift in competitive conditions that has occurred since the time of the *Triennial Review Order* — necessarily means it can handle the much lower volumes that would be required in other states. Moreover, as described above, it is likely that there will be very little hot-cut activity in the future given that the major UNE-P carriers have all decided to compete using VoIP.

In any event, Verizon has performed extensive studies that demonstrate its ability to handle hot-cut volumes throughout its region. First, Dr. William Taylor explains that it is unlikely that Verizon will perform many hot cuts in the future, but he calculates the number of additional hot cuts that might be required under three different hypothetical scenarios. *See Declaration of Dr. William Taylor Regarding Hot Cuts* ¶¶ 39-45 & Exh. 1 (Attachment L) (“Taylor Hot Cuts Declaration”). Second, based on Dr. Taylor’s calculations of incremental hot cuts under these scenarios, the Declaration of Thomas Maguire calculates the additional work force that Verizon would need and explains that, as in New York, Verizon will have no trouble building up this work force should it become necessary. As in New York, Verizon will be able to find qualified employees, hire and train them, and fit them in its central offices. *See Declaration of Thomas Maguire* ¶¶ 48-67 (Attachment K); Taylor Hot Cuts Declaration ¶ 51.

IV. STATE COMMISSIONS HAVE NO AUTHORITY UNDER FEDERAL OR STATE LAW TO IMPOSE OR ENFORCE UNBUNDLING REQUIREMENTS WHERE THE COMMISSION HAS NOT FOUND IMPAIRMENT

In the wake of the *Triennial Review Order* and *USTA II*, CLECs have argued before state commissions across the country that they have the authority to require incumbents to provide unbundled access to network elements — and to require incumbents to do so at TELRIC rates —

REDACTED – FOR PUBLIC INSPECTION